

Jackson, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STAHL SPECIALTY COMPANY

and

Case 17–CA–088639

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL #1464
affiliated with the INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO

ORDER REMANDING¹

On September 30, 2013, Administrative Law Judge Christine E. Dibble issued a decision in this proceeding. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In its exceptions² and supporting brief, the Respondent argues, inter alia, that Christine E. Dibble, the administrative law judge who presided over the hearing below

² The first of the Respondent's 127 exceptions states, "Respondent objects to the issuance of the Complaint in this matter, as Acting General Counsel Lafe Solomon lacked authority to do so by virtue of his unconstitutional appointment by an unconstitutionally-comprised National Labor Relations Board." For the reasons stated below, we reject this argument.

As an initial matter, the Respondent did not raise any issue concerning the authority of the Acting General Counsel during the investigation or before the Administrative Law Judge, nor did the Respondent elaborate further on this argument in its brief, other than a passing citation to *Hooks v. Kitsap*, Case No. 3: 13-cv-05470BHS, 2013 WL 4094344 (W.D. Wash., Aug. 13, 2013), which does not support the Respondent's theory. Under Sec. 102.46(b)(2) of the Board's Rules and Regulations, this type of "bare exception" may be disregarded. *Industrial Contractors Skanska, Inc.*, 362 NLRB No. 169, slip op. at 1 fn. 1 (2015); *The Earthgrains Company and Bakery*, 351 NLRB 733, 733 fn. 1 (2007).

Moreover, even assuming we were to consider the Respondent's argument regarding the Acting General Counsel's appointment "by an unconstitutionally-comprised" Board, we would reject this argument. Contrary to the Respondent's assertion, the Board had no role in the selection of the Acting General Counsel. Rather, on June 18, 2010, the President directed Lafe Solomon, then-Director of the NLRB's Office of Representation Appeals, to serve as Acting General Counsel pursuant to Sec. 3345(a)(3) of the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 *et seq.* Under the strictures of that provision, Solomon was eligible to serve as Acting General Counsel at the time the President directed him to do so. See *Hooks v. Kitsap Tenant Support Services, Inc.*, ___ F.3d ___, 2016 WL 860335, at *4 (9th Cir. Mar. 7, 2016); *SW General, Inc. v. NLRB*, 796 F.3d 67, 73 (D.C. Cir. 2015), petition for rehearing en banc denied, Case No. 14-1107 (January 20, 2016), petition for certiorari filed, No. 15-1251 (Apr. 6, 2016). Thus, Solomon properly assumed the duties of Acting General Counsel, and we find no merit in the Respondent's argument regarding the Acting General Counsel's appointment "by an unconstitutionally-comprised" Board.

We acknowledge that the decisions in *Kitsap* and *SW General* also held that Solomon lost his authority as Acting General Counsel on January 5, 2011, when the President nominated him to be General Counsel. *Kitsap*, *supra*, at *5; *SW General*, 796 F.3d at 78. While that question is still in litigation, the Respondent has never raised that argument in this proceeding, and we find that the Respondent thereby has waived the right to do so.

Finally, on September 15, 2015, General Counsel Richard F. Griffin, Jr., issued a Notice of Ratification, which states, in relevant part,

I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.

and issued the September 30, 2013 decision, was appointed at a time when the Board lacked a quorum, that her appointment is therefore not valid, and that she had no lawful authority to act in this proceeding. The Respondent is correct that under the court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the Board lacked a valid quorum at the time it originally approved Judge Dibble's appointment in July 2012. However, on July 18, 2014, the Board ratified all administrative and personnel decisions made from January 4, 2012, to August 5, 2013, and expressly authorized Judge Dibble's appointment. As the Board stated in its Minute of Board Action ([full text available here](#)),³ it took this action in an effort to resolve any continuing uncertainty regarding various actions taken during the time the Board lacked a quorum.⁴

In our view, this ratification resolves any uncertainty regarding Judge Dibble's appointment as an administrative law judge. Nevertheless, we note that other Agency

My action does not reflect an agreement with the appellate court ruling in *SW General*. Rather, my ratification authorizes the continued prosecution of this matter and facilitates the timely resolution of the charges that I have found meritorious while the issues raised by *SW General* are being resolved. Congress expressly exempted "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. (Citation omitted.)

For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

Thus, even assuming that the Respondent had not previously waived its right to challenge the continued authority of the Acting General Counsel following his nomination by the President, in view of the independent decision of General Counsel Griffin to continue prosecution of this matter, we reject as moot any argument challenging the circumstances of Solomon's "appointment" as Acting General Counsel.

³ The Minute of Board Action is available at: <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3302/7-18-14.pdf>.

⁴ See Order Contingently Delegating Authority to the Chairman, the General Counsel, and the Chief Administrative Law Judge, 76 Fed. Reg. 73719 (Nov. 29, 2011).

officials whose appointments were ratified on July 18, 2014, have taken the additional step of independently ratifying the actions they took between the date of their initial appointment and the Board's ratification. See, e.g., *Pallet Companies, Inc.*, 361 NLRB No. 33, slip op. at 1-2 (2014), enfd. mem. No. 14-1182, 2015 WL 9309133 (D.C. Cir. Dec. 18, 2015) (per curiam). In the instant matter, however, Judge Dibble issued her decision and this case was transferred to the Board prior to the Board's ratification of her appointment, thereby divesting Judge Dibble of jurisdiction. Thus, Judge Dibble did not have the opportunity to consider whether or not to ratify her prior actions.

This is a complex case involving numerous alleged violations of Sections 8(a)(1) and (3) of the Act, including allegations that, during a union organizing campaign, the Respondent engaged in unlawful surveillance of union handbilling, threatened employees with plant closure if they selected the Union, interrogated an employee about his union activities and sympathies and those of other employees, threatened employees with permanent job loss if they were replaced by new hires while on strike, and unlawfully discharged a union supporter. The hearing lasted 5 days and the judge's decision spans 34 pages. The Respondent filed 127 exceptions, many of which involve the judge's credibility determinations, and the Respondent has made it clear that it intends to continue to litigate the question of the judge's authority.

Under all the circumstances of this case, and without concluding or suggesting that the judge lacked the authority to issue the September 30, 2013 decision, in an effort to remove any lingering questions, we have decided to remand this matter to Judge Dibble so that she can consider anew the issues presented now that her appointment has been ratified by a fully confirmed five-member Board. On remand, Judge Dibble will

have full authority over this matter and may decide whether or not to ratify her prior actions herein, to adopt or modify her prior decision, or to issue an entirely new decision. Absent a specific order by Judge Dibble, this remand does not give the parties the opportunity to relitigate any matter previously presented for decision, nor does it give any party the right to expand the scope of the issues previously presented.

Having duly considered the matter,

IT IS ORDERED this case is hereby remanded to Judge Dibble for further proceedings consistent with this order.

Dated, Washington, D.C. April 15, 2016.

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD